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No. 95-5257

In The
Supreme Court of the United States
October Term, 1995

SAUL ORNELAS and ISMAEL ORNELAS-LEDESMA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC. IN SUPPORT OF AFFIRMANCE OF THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS BELOW.

This Brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioners and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over one hundred times in the Supreme Court of the United States and over thirty-five times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all our citizens.

Amici are national professional associations representing the interests of law enforcement and prosecutorial agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of overseeing the process of stop and frisk, arrest and search and seizure within the bounds of the law, as well as training and the formulation of administrative guidance on this subject, and (2) prosecutors and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, and to prosecute crimes and

represent the states on appellate review of cases involving evidence obtained as a result thereof.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

ARGUMENT

IN NON-WARRANT CASES, APPELLATE COURTS SHOULD NOT CONDUCT A *DE NOVO* STANDARD OF REVIEW CONCERNING REASONABLE SUSPICION TO STOP AND PROBABLE CAUSE TO SEARCH; A UNIFORM STANDARD OF NO *DE NOVO* REVIEW SHOULD APPLY TO BOTH WARRANT AND NON-WARRANT CASES.

In this case Milwaukee, Wisconsin, police suspected that two people in a car with California license plates were drug dealers. They followed them into a motel and obtained one of their names from the registry and another from automobile records. They then ran both names through "NADDIS," the Narcotic and Dangerous Drug Information System operated by the Drug Enforcement Administration (DEA). DEA came back with two "hits"; the names corresponded "more or less to names of suspected drug dealers in the NADDIS database . . ."

Although the magistrate judge and trial court were given no information on the reliability of the NADDIS system, the Seventh Circuit Court of Appeals, in *United States v. Ornelas-Ledesma*, 16 F.3d 714 (7th Cir. 1994), concluded that there was reasonable suspicion for the police to make an investigative stop of the pair as they were leaving the motel.

The defendants filed for review with this Court, requesting

a consideration of two questions, i.e.:

I. In non-warrant cases, should appellate courts conduct a *de novo* standard of review concerning reasonable suspicion to stop and probable cause to search?

II. Was it a violation of defendants' due process rights for the trial court to refuse access to the raw data comprising the NADDIS check, which was later used to justify both the stop and the search?

In granting review, this Court confined itself to question I, *supra*. *Amici* submit that the issue is a very important one for search and seizure law. The Seventh Circuit had previously adopted a "clear error" standard of review in *search warrant* cases, i.e., deferring to the findings below and not conducting a *de novo* review on appeal on the issue of probable cause unless there were "clear error." *United States v. Spears*, 965 F.2d 262 (7th Cir. 1992).

If the Court adopts the same rule for *warrantless* stops, frisks, and searches, it would clarify the procedural law with respect to appellate review of search and seizure probable cause issues, including the rules with respect to investigative stops under *Terry v. Ohio*, 392 U.S. 1 (1968). It would also be of great assistance to law enforcement officers who need help, and not hindrance, in their daily work. It would provide clear guidance to the police through a uniform system of Fourth Amendment jurisprudence and carry forward the Court's emphasis upon "bright line" rules for police, an emphasis which was initiated in *New York v. Belton*, 453 U.S. 454 (1981), as urged by *amici* in several cases before this Court in the last 15 years.

Amici submit that the type of question involved in this case is essentially a question of fact. As such, using the "totality of the circumstances" approach established by this Court in *Illinois v. Gates*, 462 U.S. 213 (1983), the suppression level and trial courts are in the best position to resolve these factual issues.

As noted in *Spears*, *supra*,

> The question . . . is the same: did probable cause exist? The [United States Supreme] Court tells us that "[p]robable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543 (1925)). It is a legal conclusion, dependent solely on a factual analysis: the facts are what the police knew and did; the finding of probable cause is a conclusion that those facts meet the legal criteria for probable cause. So the question for us is whether this finding should be reviewed deferentially, as ordinary findings of fact are, or *de novo*, as ordinary legal rulings are.
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> . . .
>
> . . . All we are doing today is announcing one standard of review for all reasonable searches. This is not as big a step as it appears at first blush. We already review exigent circumstances cases for clear error. *See, e.g., United States v. Sewell*, 942 F.2d 1209, 1213 (7th Cir. 1991). The same is true of consent cases. *See, e.g., United States v. Berk*, 930 F.2d 1219, 1221 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 269, 116 L.Ed.2d 221 (1991). By our action today we simply bring probable cause-based non-warrant cases in line with the rest of our Fourth Amendment reasonable search jurisprudence. And in line with three of our sister circuits, who likewise review probable cause determinations for clear error. *See United States v. Fox*, 902 F.2d 1508, 1513 (10th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 199, 112 L.Ed.2d 161 (1990); *United States v. Williams*, 897 F.2d 1430, 1435 (8th Cir. 1990); *United States v. Santana*, 895 F.2d 850, 852 (1st Cir. 1990).

United States v. Spears, supra, at 270-271.

Amici note that, as with the determination of the issues surrounding the prophylactic rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), independent review by appellate courts at both state and federal levels of questions of fact is not only unnecessary on the basis of Fourth Amendment and *Miranda* rule jurisprudence, but also unwise from a judicial policy standpoint. The appellate courts simply do not have the resources to re-examine questions of fact in Fourth Amendment cases. Opening the door to *de novo* review of such issues will open a chapter of judicial involvement in the minutiae of fact issues similar to that plaguing our courts in *Miranda* cases, as chronicled in the study on the impact of *Miranda's* prophylactic rule upon the appellate courts in "Miranda v. Arizona—Is It Worth the Cost?," 24 *Calif. Western Law Rev.* 185-200 (1987-1988). As *amici* pointed out in our brief filed with this Court in *United States v. Green*, 113 S.Ct. 1835 (1993) (petition for certiorari dismissed upon death of respondent), the appellate courts are not only unequipped to deal with such questions of fact, but frequently their chorus of uncoordinated voices leaves the police with virtually no "bright line" guidance on factual issues.

The problem is the same in Fourth Amendment cases as in *Miranda* prophylactic rule cases. If the Court sanctions *de novo* review in this case, it will open a large Pandora's Box of inconsistent appellate rulings in Fourth Amendment cases and leave the police with little or no guidance at the level of the courts in which their work is largely involved, i.e., the suppression and trial level courts. It would do disservice to the principle articulated by this Court in *Gates, supra*, 462 U.S. at 232, 103 S.Ct. at 2329, that "probable cause is a fluid concept —turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a set of legal rules." The Court would introduce into Fourth Amendment jurisprudence the multiplicity of levels of review of essentially fact issues that now exists in *Miranda* cases. *Thompson v. Keohane*, 116 S.Ct. 457 (1995).

> As concluded wisely by the court below:
> In both cases [warrant and warrantless], if there is probable cause, the search is reasonable and does not violate the Fourth Amendment. If there is no probable cause, the factfinder at trial will not consider the evidence, either because the warrant did not issue, or the exclusionary rule operates to keep it out. It is the front-line judicial officer in both cases who conducts the initial inquiry, who concludes there is or is not probable cause, and an appellate panel should not substitute its judgment in either case.
> *United States v. Spears, supra,* at 271.

Amici submit on behalf of law enforcement officers, administrators, and counsel, that affirmance of the decision below is consonant with established case law, sound judicial policy, and the need to provide law enforcement with bright line rules that can be effectively applied at the street level. To rule otherwise will be to create a new era of confusion and inconsistency in Fourth Amendment jurisprudence at the state and federal appellate levels similar to that which presently exists in the area of *Miranda's* prophylactic rule case law. We respectfully ask the Court not to launch the nation's appellate courts upon this fruitless endeavor.

CONCLUSION

Amici urge this Court to affirm the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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